**The Prosecutor's Manual Volume I**
**Chapter 2**
**Identifications**

## Table of Contents

**The Prosecutor's Manual Volume I**

**Chapter 2**

**Identifications**

## I. INTRODUCTION

This chapter discusses the admissibility of identifications of a defendant, whether pretrial or at trial. Admissibility will usually be determined at a suppression hearing where a determination will be made on whether the introduction of the identification will violate the defendant's Sixth Amendment Right to Counsel and/or Fifth Amendment Right to Due Process of Law.

## II. SIXTH AMENDMENT RIGHT TO COUNSEL

### A. Corporeal (Physical) Identifications

#### 1. United States Supreme Court's Analysis

The right to an attorney at pretrial eyewitness confrontations is constitutionally controlled by *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877 (1972), *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967), and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967). The thrust of these cases is that, prior to the initiation of adversarial judicial criminal proceedings, there is no right to counsel, and that, subsequent to adversarial proceedings, counsel must be provided.

In *Kirby*, the victim was robbed of his wallet. The defendant was stopped the next day because officers thought he looked like a "wanted" man. When asked for identification, the defendant produced the victim's papers. Defendant was arrested and the victim brought to the station for identification. The court, in resolving that counsel was not required at the identification, stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

406 U.S. at 689.

#### 2. Arizona Courts' Analysis

In construing the above opinions, Arizona cases have ruled that where the defendant has been arrested, but no preliminary hearing has been held and no indictment issued, the defendant has no right to counsel at a pretrial lineup. *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985) (petition to detain); *State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980) ("A showup identification is admissible if the identification is reliable notwithstanding the suggestiveness"); *State v. Money*, 110 Ariz. 18, 21, 514 P.2d 1014, 1017 (1973) (lineup); *State v. Gering*, 108 Ariz. 377, 379, 498 P.2d 465, 467 (1972) (lineup); *State v. Salcido*, 109 Ariz. 380, 509 P.2d 1027 (1973) (at the scene show-up); *State v. Perry*, 116 Ariz. 40, 47, 567 P.2d 786, 793 (App. Div. 2 1977) (The fact that the defendant had been indicted and was represented by counsel for one rape did not mean he was required to have counsel present for a lineup on a second rape for which he had not yet been arrested or charged).

At least one Arizona decision has upheld a post-information show-up without an attorney. However, the witnesses who identified the defendant at his arraignment (before an attorney had been appointed) had previously identified the defendant from a photograph prior to his arrest. *State v. Tafoya*, 104 Ariz. 400, 454 P.2d 145 (1969).

3. Adversary Proceedings

A defendant has a right to an attorney after the initiation of adversarial proceedings.

a. Indictment or Information

A defendant has a right to the presence of an attorney after an indictment or information has been filed. See State v. *Tresize*, 127 Ariz. 571, 623 P.2d 1 (1980); *State v. Weiss*, --- P.3d ----, 2010 WL 2121964 (App. Div. 1 2010). Note: *See also* Rule 15.2, Ariz. R. Crim. P.

b. Exclusionary Rule

Failure to provide counsel at this "critical stage" triggers the exclusionary rule. *United States v. Wade*, 388 U.S. 218, 226 (1967); *Gilbert v. California*, 388 U.S. 263 (1967) (pre-indictment handwriting samples are not a critical stage of proceedings). *See also State v. Hartford*, 133 Ariz. 328, 329, 651 P.2d 856, 857 (1982), cert. denied, 104 S.Ct. 141 (1983).

4. Defense Counsel's Role

The defendant's attorney is permitted to be present at a post-complaint lineup primarily as an observer to later contest the suggestibility of the procedures used. If defense counsel makes reasonable suggestions in order to avoid a suggestive lineup, he should be accommodated if possible. If the defense attorney is accommodated or has no comments regarding lineup, the prosecutor is in a much stronger position to later argue waiver of any defects.

The defense attorney need not be given the witnesses' names or statements. Rule 15, Ariz. R. Crim. P.

The witness does not have to talk to the defense attorney at that time. The prosecutor or an officer can tell the witness that a mutually convenient interview can be arranged to comply with the Rule 15 discovery provisions.

The defendant, or his attorney, does not have a right to conduct his own lineup where there was no showing that the state's lineup was unreliable. *See State v. Rossi*, 146 Ariz. 359, 706 P.2d 371 (1985).

B. Photographic Identifications

The presence of counsel is not required at a photographic lineup even if defendant is in custody or adversary proceedings have begun. *United States v. Ash*, 413 U.S. 300, 317, 93 S.Ct. 2568 (1973); *State v. McDonald*, 111 Ariz. 159, 526 P.2d 698 (1974). In *McDonald*, the defendant had robbed a family in their home. At the first *Dessureault* hearing, an identification by one family member was suppressed. Subsequently, without notifying defense counsel, three other family members viewed a photographic lineup and identified the defendant. Citing and quoting from *Ash*, *supra*, the court stated:

> "The United States Supreme Court has ruled that there is no right to presence of counsel at such post-indictment lineups, distinguishing them from 'corporeal lineups' which constitute 'a trial-like confrontation requiring the Assistance of Counsel' to preserve the adversary process by compensating for advantages of the prosecuting authorities."

111 Ariz. at 164, 526 P.2d at 703.

One of the reasons counsel is not required at photographic lineups is that the "lineup" can be viewed at a later time, if the photographic lineup is preserved. Preserving the photographic lineup is a good idea, if for nothing else than to be able to refute defense arguments that the lineup was unfair.

## III. FIFTH AMENDMENT RIGHT TO DUE PROCESS

The Due Process Clause requires "fundamental fairness" in the identification procedure.

### A. The United States Supreme Court's Analysis Of The Due Process Clause *As* It Relates To Identifications

#### 1. Suggestiveness - Taint - Independent Source Test

Originally, the Court's principal concern was with the suggestiveness of an identification procedure. In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the court stated in dictum that an identification must be excluded "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The inquiry mandated that a determination be made as to whether the improper procedure tainted future identifications or conversely whether the witness had an independent basis or source for later identifications other than his viewing of the suspect at the identification (e.g.,

his re-collections at the time of the offense). *See also United States v. Wade*, 388 U.S. 218 (1967).

2. Reliability

Subsequently, in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972), the court established a different standard, reliability of the victim's identification, as the determining criterion of the admissibility of an identification. In *Biggers*, the rape victim viewed lineups and showups for seven months before identifying the defendant in a "one-on-one show-up". The victim said that she had "no doubt" about her identification because "there was something I don't think I could ever forget" about his face.

After acknowledging that suggestive confrontations do not violate a defendant's due process rights despite the increased likelihood of misidentification,, the court turned to the central question:

> . . . whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include:
>
> a. The opportunity of the witness to view the criminal at the time of the crime.
>
> b. The witness' degree of attention.
>
> c. The accuracy of the witness' prior description of the criminal.
>
> d. The level of certainty demonstrated by the witness at the confrontation.
>
> e. The length of time between the crime and the confrontation.

409 U.S. at 198 (emphasis and numbering added).

Five years after the *Biggers* decision, the court reaffirmed its commitment to the "reliance" test as weighed against ... the corrupting effect of the suggestive identification itself." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977). In *Brathwaite*, the court rejected the notion that any degree of suggestiveness should cause the exclusion of evidence and instead embraced the proposition that ". . . if the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible." 432 U.S. at 110, fn10 (emphasis added). The rationale for this decision was that where an identification was reliable but occurred under unnecessarily suggestive circumstances, exclusion for the sake of deterrence was a "Draconian sanction." 432 U.S. at 113.

(Any prosecutor with a "suggestivity" problem would be well advised to read the *Brathwaite* case including the dissenting opinion by Marshall as it gives an excellent historical discussion and puts the identification issue in easy perspective.)

B. Arizona Analysis

### 1. The *Dessureault* Test

To establish that the identification testimony violated a defendant's due process rights, the defendant must "establish (1) that the circumstances surrounding the pretrial identification 'created a substantial likelihood of irreparable misidentification,' and (2) that the state bore sufficient responsibility for the suggestive pretrial identification to trigger due process protection. " *State v. Williams*, 166 Ariz. 132, 137, 800 P.2d 1240, 1245 (1987) quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967 (1968).

In response to *Simmons*, the Arizona Supreme Court in *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969), set out the procedure to be followed when a defendant contended that his out-of-court identification by a witness was suggestive and that an in-court identification would be "tainted" by the prior identification:

- A hearing must be held outside the presence of a jury wherein the state must show by clear and convincing evidence that the pretrial identification procedures were not unduly suggestive.
- If the Court determines that the pretrial procedures were unduly suggestive or that the State has failed to meet its burden, the State has the burden of showing by clear and convincing evidence that the proposed in-court identification will not be tainted by the improper pretrial identification.
- If the trial court determines that the State has shown that the in-court identification will not be tainted, the Court must, if requested by the defendant, instruct the jury that the jury must find any in-court identifications were not tainted by pretrial identification procedures.

#### a. Suggestivity

Suggestivity is covered in great detail in a later section.

#### b. Taint

In *Dessureault, supra*, the victim of a robbery viewed an unduly suggestive lineup. Later, at the suppression hearing the following colloquy between the defense attorney and victim occurred:

> Q: . . . did the period that you observed this person (during the lineup) in any way help you here today make the identification you are making?
>
> A: It does, yes.
>
> Q: Each time, it is only common sense - each time you see a person, especially a stranger, you are a little bit more able to tell who he is, isn't that true?
>
> A: Yes, sir.

The supreme court's found that this exchange did not necessarily taint the in-court identification. 104 Ariz. at 384, 385. See also *State v. DeLuna*, 107 Ariz. 536, 537, 490 P.2d 8, 9 (1971).

c. Independent Basis (Source)

To show that the improper procedures did (will) not taint later identifications, the State must establish that the witness has an "independent basis" (other than the suggestive identification) for his/her in-court identification.

Rarely will the State be unable to carry this burden. For example, in *State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978), a narcotics agent looked at a number of pictures in order to determine a suspect's name. He then gave the discovered picture to a second agent who had been involved in the narcotics transaction with the suspect and asked, "Does this guy look familiar to you?" Although ruled suggestive, the second agent was allowed to identify the defendant at trial because his viewing of the picture did not "taint" his in-court identification. The basis for this ruling was the following testimony at the Dessureault hearing:

> Q: If you can try and put your viewing the photo on June 16th out of your mind - can you do that?
> A: Yes.
> Q: Thinking back to May 27th, the time you made the purchase, can you at this time, say the gentleman in court is the individual that was involved in the transaction based on your viewing him at that time?
>
> A: Yes.

119 Ariz. at 334.

d. Suggestive but Independent Basis

The following are examples of cases in which the court found the identification procedure unduly suggestive but also found an independent basis for the subsequent identification:

*State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009).

*State v. Swoopes*, 155 Ariz. 432, 747 P.2d 593 (App. Div. 1 2000).

*State v. Rosthenhausler*, 147 Ariz. 486, 711 P.2d 625 (App. Div. 2 1985).

*State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985).

*State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985). (assuming procedure was suggestive)

*State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (Ariz. 1983); *cent denied* 104 S.Ct. 2670. (witness changed description of assailant and was unable to identify defendant from photo line-up but identified him at preliminary hearing)

*State v. Thibeault*, 131 Ariz. 192, 639 P.2d 382 (1981).

*State v. Reynolds*, 125 Ariz. 530, 611 P.2d 117 (1980).

*State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978) (undercover detective identified defendant from photo lineup

three weeks after purchasing drugs from him).

*State v. Bailes,* 118 Ariz. 582, 578 P.2d 1011 (App. Div. 2 1978).

*State v. LaBarre,* 114 Ariz. 440, 561 P.2d 764 (App. Div. 1 1977).

State v. Marquez, 113 Ariz. 540, 558 P.2d 692 (1976).

*State v. Miranda,* 109 Ariz. 337, 509 P.2d 607 (Ariz. 1973).

*State v. Bainch,* 109 Ariz. 77, 505 P.2d 248 (Ariz. 1973).

*State v. DeLuna,* 107 Ariz. 536, 490 P.2d 8 (Ariz. 1971).

*State v. Dessureault,* 104 Ariz. 380, 453 P.2d 951 (Ariz.1969).

e. Suggestive and Tainted

In the following cases, the court found the identification unduly suggestive and found there was no independent basis for the later identifications.

The court found that an identification made ten days after the crime was too distant to be independently reliable where the witness saw the assailant for a brief period of time. *State v. Strickland,* 113 Ariz. 445, 556 P.2d 320 (1976) .

Initially, the witness could only identify the race and distinct mustache worn by the assailant. This description was insufficient to overcome the unduly suggestive photo lineup in which the detective drew the same mustache only on the defendant's picture. The witness was still unable to pick the defendant out of the lineup until after the detective told him he picked the wrong photo. After he picked the defendant, the officer told him he picked the "correct" photo. *State v. Alexander*, 108 Ariz. 556, 503 P.2d 777 (1972).

f. Miscellaneous

In *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987), the defendant deposed two witnesses who had not been able to identify the defendant in a photo lineup. After an argument between the witnesses and the defendant, the witnesses stated that they would positively identify the defendant as the murderer at trial. The circumstances surrounding the identification were extremely suggestive. However, the defendant, not the state, created those circumstances "when Williams exercised his right to seek exculpatory identification testimony, and to seek to seek it personally rather than through counsel, he took the risk that one of the witnesses would identify him as the suspect. Absent some wrongdoing by the state, we see no reason to prevent it from using inculpatory evidence resulting from Williams' efforts." *Id*. at 138, 800 P.2d at 1246.

2.Application of the Reliability Test in Arizona

At times, Arizona courts and prosecutors have been confused on how to reconcile the tests described in

*Dessureault* and *Biggers*. For example, in State v. Aita, 114 Ariz. 470, 472, 561 P.2d 1242,1244 (App. Div. 2 1976), the Court heard the case of a witness identifying the defendant in a show-up shortly after the crime occurred, reviewed the *Biggers* admissibility factors, and concluded:

> "We are satisfied that the circumstances of the out-of-court identification procedure were not tainted and that the out-of-court and in-court identifications were reliable."

"Taint" is a word of art. An unduly suggestive identification may "taint" a later identification, but, as in this case, where there was only one out-of-court identification, the "circumstances" cannot be tainted but only unduly suggestive. Further, the court implies that both the out-of-court and in-court identifications must be shown to be "reliable." *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243 (1977) is explicit in its holding that if one identification is reliable, all subsequent identifications will also be reliable.

a. Reliability and Independent Source

It appears, however, at the risk of oversimplification, that the "reliability" test has been used interchangeably or in combination with the "taint - independent source" test. *State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978), is a case in point. In *McGill*, one agent showed another agent a photo of a heroin dealer and asked, "Does this guy look familiar to you?" After citing the *Simmons* test, *supra*, the *Biggers* test, *supra*, the clear and manifest error rule, *infra*, the court says:

> We believe, in the instant case, that the in-court identification by Detective DeLeon was based not upon the photo identification, but upon the view of the defendant at the time of the crime. It has not been shown that the identification of the defendant at trial was tainted by a questionable pretrial identification.

b. Reliability Factors and Objectivity

An obvious deduction is that the "reliability factors" give some objective bases for determining whether there is an "independent basis" for a witness' identification. In fact, in 1976, the Arizona Supreme Court began to use the reliability factors outlined in *Biggers*, supra, to satisfy the independent basis test. *State v. Ware*, 113 Ariz. 337, 554 P.2d 1264 (1976). Subsequent cases have applied those principles. For example, in *State v. Williams*, 113 Ariz. 14, 545 P.2d 938 (1976), the court applied the principle to a lineup consisting of the manacled black defendant, two white uniformed policemen and a police dog. Despite the suggestibility of that show-up, the court discussed the reliability of the identification instead of "taint" and said the identification was reliable after a 2 1/2 hour rape.

c.Suggestive but Reliable Identifications

The following are samples of those cases in which the Court discussed an identification procedure it found suggestive but nonetheless found the in-court identification reliable:

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172 (2002).

*State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987).

*State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (1985).

*State v. Alvarez*, 145 Ariz. 370, 701 P.2d 1178 (1985).

*State v. Williams*, 144 Ariz. 433, 698 P.2d 678 (1985).

*State v. Newman*, 141 Ariz. 554, 688 P.2d 180 (1984).

*State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied 104 S.Ct. 2670.

*State v. Thibeault*, 131 Ariz. 192, 639 P.2d 382 (1981).

*State v. Tresize*, 127 Ariz. 571, 623 P.2d 1 (1980).

*State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (1980).

*State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1980).

*State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980).

*State v. Trujillo*, 120 Ariz. 527, 587 P.2d 246 (1978).

*State v. Williams*, 113 Ariz. 14, 545 P.2d 938 (1976).

d. Suggestive and Unreliable Identifications

*State v. Strickland*, 113 Ariz. 445, 556 P.2d 320 (1976).

e. Inability to Identify

The inability of the witness to make an identification does not affect the validity of an otherwise reliable identification. *State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986) (child unable to identify defendant at trial); *State v. Skelton*, 129 Ariz. 181, 629 P.2d 1017 (App. Div. 2 1981) (inability to identify in court months after crime did not invalidate pretrial identification); *State v. Rosthenhausler*, 147 Ariz. 486, 711 P.2d 625 (App. Div. 2 1985) (failure to previously identify defendant's picture at photo lineup did not bar trial identification; weight, not admissibility).

f. Unique Characteristics Are Reliable

Facial characteristics unique to the defendant make the lineup more reliable. In *State v. Alvarez*, 145 Ariz. 370, 701 P.2d 1178 (1985), the appellate court said defendant's unique facial moles (glimpsed for 2-5 seconds) made the lineup more reliable, not unduly suggestive. A photo lineup in which only the

defendant has a unique tattoo does not render that lineup unduly suggestive. *State v. Perea*, 142 Ariz. 352, 690 P.2d 71 (1984).

3. Suggestiveness

Because suggestiveness is the foundational issue under both *Dessureault* and *Biggers*, it is probably appropriate at this juncture to discuss the circumstances under which Arizona courts have or have not found undue suggestivity.

a. Pre-Identification Suggestivity

Non-governmental pretrial suggestivity can not be used to suppress evidence. *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987). See generally *State v. Castaneda*, 150 Ariz. 382, 724 P.2d 1 (1986) (witness saw defendant's picture on television, identified him at unrelated trial).

1) Application to Showups

Courts have traditionally found an unduly suggestive confrontation exists where an officer makes statements about who he suspects to have committed the crime. *State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (1985) (officer made pre-identification assurances of the defendant's guilt); *State v. Alta*, 114 Ariz. 470, 561 P.2d 1242 (App. Div. 2 1976) ("I think we have him" prior to show-up); *State v. Williams*, 113 Ariz. 14, 545 P.2d 938 (1976) (prior to "show-up", rape and robbery victim was told that she would view the man police found in her car); *State v. Rodriquez*, 110 Ariz. 57, 514 P.2d 1245 (1973) (prior to show-up, victim was told the men who attempted to rob him were in the hospital); *State v. Armijo*, 26 Ariz. App. 521, 549 P.2d 616 (App. Div. 1 1976) (prior to show-up, witnesses told that their stolen property found in suspect's car).

However, in *State v. Kelly*, 123 Ariz. 24, 597 P.2d 177 (1979) the victim, prior to a show-up, was told that the police had a suspect in custody. Although the defendant was identified while sitting in a police car, the court condoned the procedure stating, "The victim . . . was given the chance to either confirm or deny the defendant's identity."

2) Application to Lineup

Prior to a lineup, the court has condoned an officer telling a witness that they would view the suspected perpetrator. *State v. McClure*, 107 Ariz. 351, 488 P.2d 971 (1971). *State v. Campbell*, 146 Ariz. 415, 706 P.2d 741 (App. Div. 2 1985) (prior to showing photo lineup, officer told witness that a suspect was in custody, but did not indicate which picture was the suspect).

In *McClure*, the victim of an armed robbery was told that the officers had a suspect. The victim then picked the defendant out of a four or five-man lineup. In ruling upon the suggestivity of this procedure, the Court stated:

> We see no reason why the police should not suggest that they have a man whom they suspect of being the guilty party. Anyone called to witness a lineup would naturally assume so. He would hardly be summoned to a lineup if there were no suspect. Hence, we do not find this circumstance unduly suggestive.

107 Ariz. at 352, 488 P.2d at 972.

In *State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (Ariz. 1985), the show-up was suggestive because, among other things, the officer told the witness that police had been waiting for the man she described when he got home, and they had recovered the gun. Despite the fact that witness did not identify the defendant until the third show-up, the court allowed her identification because her description, made without police assistance, matched the defendant, her attention had been focused on the defendant after she saw him leave the crime scene, and only thirty minutes elapsed between the crime and her identification. The witness' caution was commended where she did not identify the defendant until the third "show-up" because the defendant had his head down the first time he went by the window and moved quickly past the window the second time.

b. Identification Suggestivity

The identification itself should be set up to avoid undue suggestivity. However, "even if a pretrial identification is unduly suggestive, it is nonetheless admissible if the witness' identification is reliable." *State v. Bracy*, 145 Ariz. 520, 530-31, 703 P.2d 464, 474-75 (1985), citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, 467 U.S. 1220.

1) Corporeal Lineups

The criteria for corporeal lineups is set out in *State v. Dessureault*, 104 Ariz. 380, 383, 453 P.2d 951 (1969) as follows:

> . . . a lineup does not require individuals of absolute identical dress, size and physical characteristics. If it were possible to establish such a lineup, clearly, identification would be impossible. It is the differences which distinguish one individual from another and by which identifications are made, but where the differences are so great that only one person could, within reason, fill the description of the accused, leaving the witness with only one possible choice, the lineup itself becomes significantly suggestive and as such materially increases the dangers inherent in eye witness identification.

Moreover, "[t]here is no requirement for either lineups or 'in-court identification' that the accused be surrounded by persons nearly identical in appearance. *State v. Mead*, 120 Ariz. 108, 111-112, 584 P.2d 572, 575-76

(App. Div. 2 1978). (The court in *Mead* ignored *Dessureault* as the relevant facts were almost identical. Careful.) *See also State v. Meeker*, 143 Ariz. 256, 693 P.2d 911 (1984).

(a) Suggestive Dissimilarities

Although a lineup does not require person of identical physical characteristics, a lineup becomes significantly suggestive "where the differences are so great that only one person could, within reason, fill the description of the accused, leaving the witness with only one possible choice." *State v. Dessureault,* 104 Ariz. 380, 383, 453 P.2d 951 (Ariz. 1969). In *Dessureault*, the perpetrator, described as having a mustache and beard, robbed a Circle K at 1:00 a.m. At 10:00 a.m., a four-man lineup was held in which the defendant was the only man with a mustache and beard. *Id*. The court found the dissimilarities suggestive but upheld the in-court identification under the independent source test. *Id*.

In *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (App. Div. 2 1977) , the defendant was thirty-six years old, the other five participants were twenty to twenty-four, the defendant was biggest in height and weight and the victim described her attacker as thirty-two to thirty-four years old. The Court of Appeals found the differences, especially the victim's reasoning behind her description of the perpetrator's age, unduly suggestive.

Nevertheless, keep in mind that not all lineups in which one person has unique features are unreliable. Defendant's unique moles made identification more reliable in *State v. Alvarez,* 145 Ariz. 370, 701 P.2d 1178 (1985).

(b). Harmless Dissimilarities

Where dissimilarities do not necessarily point to the suspect, as occurred in the following cases, the lineup procedure will be upheld.

Victims were robbed by three defendants. In a four-man lineup, one defendant was the only one with a mustache, however, lineup was not suggestive because victims were looking for three men, two of whom (not included in the lineup) did not have mustaches. *State v. Money,* 110 Ariz. 18, 514 P.2d 1014 (1973).

The lineup was not suggestive despite some age disparity, a height difference, and the fact that defendant was the only person with his shirt tail out. The age and height differences among the lineup participants were not significant and, although the defendant was the only one with his shirt tail untucked, other participants had unique items of clothing. *State v. Hooper,* 145 Ariz. 538, 703 P.2d 482 (1985).

2). Photographic "Lineups"

The principle factor in determining suggestiveness is, as in corporeal lineups, whether the suspect is emphasized. Ideally, the suspect should not be the only person common to both a photo lineup and a subsequent live lineup because the court may find this suggestive. *State v. Via,* 146 Ariz. 108, 704 P.2d

238 (1985).

The traditional test for determining whether pretrial photographic procedures are valid is that the procedures will be set aside only when the procedures are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This test relies upon the general guidelines of *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967 (1969).

(a) Unduly Suggestive Photographic Lineups

Police showed a robbery witness 100 pictures from which he picked someone other than defendant's photo. The witness could only identify the race and distinct mustache worn by the assailant. This description was insufficient to overcome the unduly suggestive photo lineup in which the detective drew the same mustache only on the defendant's picture. The witness was still unable to pick the defendant out of the lineup until after the detective told him he picked the wrong photo. After he picked the defendant, the officer told him he picked the "correct" photo. *State v. Alexander,* 108 Ariz. 556, 503 P.2d 777 (1972). (tainted the in-court identification and not harmless error).

Victims were robbed by a female impersonator who had given them a ride in his car. Upon being shown a four-photo composite of a different female impersonator, the victims identified that person as the perpetrator. Later, by tracing the license number of the perpetrator's car, the officers discovered suspect Lang. The officers, after telling the victims the suspect's name was Lang, showed them a three photo spread. The photo chosen by the victims had Lang's name on it. *State v. Lang,* 107 Ariz. 400, 489 P.2d 37 (1971) (error in admitting pretrial identifications was harmless because of accomplice testimony).

(b). Not Unduly Suggestive Photographic Lineups

"Lineups need not and usually cannot be ideally constituted ... The law only requires that they depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez,* 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985).

The fact that the defendant's photo was taken from a slightly greater distance than the other five photographs in the lineup does not make his photo stand out to the degree that the lineup was unduly suggestive. *State v. Phillips,* 202 Ariz. 427, 46 P.3d 1048 (2002).

A photo lineup may contain differences in lighting between the defendant's photo and other photos without being unduly suggestive. *State v. Gonzales,* 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995).

The photo lineup was not suggestive despite some subtle differences in the photographs because the persons in the photos basically resembled each other and the defendant's photo did not stand out from the

others. *State v. Dixon*, 153 Ariz. 151, 735 P.2d 761 (1987).

The defendant failed to point to any features in the photo that differed from his likeness, and the court found no aberrations or distortions in the photo after review. Moreover, the photo lineup took place one day after the crime when the victim's memory was still fresh. *State v. Rossi*, 146 Ariz. 359, 706 P.2d 371 (1985).

The defendant claimed the photo lineups were unduly suggestive for three reasons: (1) his was the only photograph common to both lineups, (2) he was the only one pictured who had facial moles, and (3) the Hispanic defendant appeared in a lineup consisting primarily of Blacks. The court rejected the first argument because the victim said she saw the assailant in profile and was able to identify him from the second lineup of profile shots. The second argument failed because the moles were unique. The court found no error in the racial makeup because the defendant's hair and skin tone were similar to other members of the lineup. *State v. Alvarez*, 145 Ariz. 370, 701 P.2d 1178 (1985).

Defendant, on trial for rape and murder of a 12-year-old girl, contended that he was subjected to an unduly suggestive photographic lineup which tainted the in-court identification. In particular, he claimed that (1) he was the only one pictured who had a facial tattoo, (2) his photograph appeared first, and (3) his photograph was blurrier than the others. The court held that this photographic lineup was not unduly suggestive. *State v. Perea*, 142 Ariz. 352, 690 P.2d 71 (1984).

Defendant was picked from an eight-man photo lineup in which he was the only one disfigured (black eyes and broken nose). Prior to this lineup, the victim had viewed approximately 2000 photos. Although not specifically holding that the lineup was not suggestive, the court distinguished *Dessureault* in that victim was not looking for disfigurement because the perpetrator was not disfigured during the crime. *State v. Bailes*, 118 Ariz. 582, 578 P.2d 1011 (App. Div. 2 1978).

The victim identified the defendant from a ten-man photo lineup in which the defendant's picture was marked "Tempe Police Department", two others were marked "Phoenix Police Department", and five were marked "Arizona State Prison." The rape occurred within a mile of the Tempe city limits. Victim testified the Tempe designation had no influence on her identification of the defendant. *State v. Jones*, 110 Ariz. 546, 521 P.2d 978 (Ariz. 1974), overruled on other grounds in *State v. Conn*, 137 Ariz. 148, 669 P.2d 581 (1983).

3. Show-ups (One-on-One Confrontations)

Show-ups or one-on-one confrontations are obviously inherently suggestive. The courts, however, have approved this procedure when conducted soon after the crime. Care should be taken to minimize any other indicia of suggestiveness, like separating the witnesses before identification, as was done in *State v. McLoughlin*, 133 Ariz. 458, 462, 652 P.2d 531 at 535 (1982) (procedure "was properly conducted and was

sufficiently reliable").

(a). Time Lapse

Arizona cases have consistently held that "a one-man showup at the scene of the crime or near the time of the criminal act is permissible police procedure." *State v. Hicks,* 133 Ariz. 64, 649 P.2d 267 (1982) (internal citations omitted). *See also State v. Nelson*, 129 Ariz. 582, 633 P.2d 391 (1981); State v. Kelly, 123 Ariz. 24, 597 P.2d 177 (1979).

(b). Rationale

A show-up "allows the police to either have the culprit identified while the witness has a fresh mental picture of him or her or else release an innocent person and continue searching for the culprit before he or she escapes detection." *State v. McLoughlin,* 133 Ariz. 458, 462, 652 P.2d 531 at 535 (1982), citing *State v. Gastelo,* 111 Ariz. 459, 532 P.2d 521 (1975).

(c) . Unduly Suggestive Show-ups

Time Lapse Between Crime And Show-Up

Four hours after the crime, at the police station, and after the witness was aware the car she identified was on police property. *State v. Trujillo*, 120 Ariz. 527, 587 P.2d 246 (1978).

Four hours after the crime and three hours after arrest. *State v. Armijo*, 26 Ariz.App. 521, 549 P.2d 616 (App. Div. 1 1976) (Rationale permitting show-up was not present where other evidence against defendant existed).

Preliminary Hearing Show-ups After Failure To Identify At Lineup

Victim picked the "wrong" person at the lineup, but was able to identify him at the preliminary hearing where the defendant was sitting at counsel table in jail garb. *State v. Strickland,* 113 Ariz. 445, 556 P.2d 320 (1976).

Photographic One-On-One

On the day following the kidnapping, the victim was shown three escape fliers that pictured each of the appellants. *State v. Newman,* 141 Ariz. 554, 688 P.2d 180 (1984).

Victim of Shop-N-Go armed robbery identified the defendant when shown a surveillance photo of the defendant while the defendant was robbing a Circle K. State v. Ware, 113 Ariz. 337, 554 P.2d 1264 (Ariz. 1976).

(d). Not Unduly Suggestive Show-ups

Time Lapse Between Crime and Show-up

*State v. McLoughlin,* 133 Ariz. 458, 652 P.2d 531 (Ariz. 1982) (within minutes of the crime).

*State v. Arnold,* 26 Ariz.App. 542, 549 P.2d 1060 (Ariz. 1976) (11 minutes).

*State v. Daniels,* 106 Ariz. 224, 474 P.2d 815 (1970) (20 minutes).

*State v. Gastelo,* 111 Ariz. 459, 532 P.2d 521 (1975) (5 minutes).

Witnesses Are Separated and Told They Need Not Identify Anyone

Within an hour of a robbery, the two witnesses were separated so they couldn't influence each other, they were told that they didn't have to pick anyone out, and that the men they would view may not have been involved in the robbery at all. *State v. Skelton,* 129 Ariz. 181, 629 P.2d 1017 (App. Div. 2 1981).

Where the Witness Knows the Defendant

In circumstances where the victim knows the perpetrator, the physical or photographic show-up may be conducted long after the crime.

In narcotics cases where the agent views the picture after the deal "to ascertain the name and record of a person he could already identify." *State v. Torres,* 116 Ariz. 377, 569 P.2d 807 (1977); *State v. Milonich,* 111 Ariz. 442, 532 P.2d 504 (1975); *State v. Lee,* 110 Ariz. 357, 519 P.2d 56 (1974); *State v. Campos,* 24 Ariz.App. 353, 538 P.2d 1154 (1975).

Where officers merely want to confirm that the suspect is the same person that the victim is accusing. *State v. Bush,* 109 Ariz. 487, 512 P.2d 1221 (1973) (victim knew defendant for a month prior to battery); *State v. Carrillo,* 108 Ariz. 524, 502 P.2d 1343 (1972) (molester was the "apartment man ... Danny").

In a Police Car

In 1973, the Supreme Court ruled that identification of a suspect while he is sitting in a police car was "suggestive." *State v. Cozad,* 113 Ariz. 437, 439, 556 P.2d 312 (1976). More recently, however, the court, in deferring to the trial court's assessment of the fairness of the procedure, affirmed with approval such an identification. *State v. Kelly,* 123 Ariz. 24, 597 P.2d 177 (1979). The court did not even address the issue in *State v. Hicks,* 133 Ariz. 64, 649 P.2d 267 (1982) despite the defendant being identified in the back of a patrol car.

The police officer-witness' show-up identification of a robbery suspect being detained in another officer's patrol car was held to be unduly suggestive, but the reliability of the identification was sufficient to compensate for the suggestiveness of the confrontation (10 minutes after the robbery). *State v. Williams,* 144 Ariz. 433, 698 P.2d 678 (1985).

Where Police Are Searching for a Missing Person

Police need not take the time to perform a line-up when they are searching for a possible kidnapping or murder victim. The show-up identification was not suggestive despite the 12 hour time lapse between the crime and the show-up due to the victims' detailed description, their unequivocal identification of the suspect, and the suspect's unusual haircut. *State v. Hoskins*, 199 Ariz. 127, 14 P.3d 997 (2000).

(e). Post-Identification Suqqestivity

Conduct subsequent to an identification which reinforces a witness' opinion that he/she picked the "right" person is frowned upon by the courts.

(1) Suggestivity After Proper Identification Procedure

However, reinforcement of a witness' identification will not vitiate an otherwise non-suggestive identification.

> "While [the courts] do not approve of such a procedure, [they] have held that where the lineup is not suggestive in the first place, such subsequent comments cannot taint an initially fair identification procedure or the in-court identification."

*State v. McDonald*, 111 Ariz. 159, 164, 526 P.2d 698, 703 (1974), citing *State v. Richie*, 110 Ariz. 590, 521 P.2d 1136 (1974); *State v. Money*, 110 Ariz. 18, 514 P.2d 1014 (1973). See also *State v. Romero*, 130 Ariz. 142, 634 P.2d 954 (1981); *State v. Richie*, 110 Ariz. 590, 521 P.2d 1136 (1974); *State v. Money*, 110 Ariz. 18, 514 P.2d 1014 (1973).

A defendant's in-court identification is not unduly suggestive because he sits at a table marked "defense," and there is "no requirement for 'in-court identifications' that the accused be surrounded by persons nearly identical in appearance." The defendant had been identified by several of the robbery victims in a pre-trial photo lineup, and no prejudice resulted from either identification. *State v. Meeker*, 143 Ariz. 256, 693 P.2d 911 (1984).

Although the officer told the witness that she had picked the right photo, the comment did not render the identification unreliable where the witness had previously constructed a composite and police had not told her she had to pick a photo or that they had a suspect in custody. *State v. Nauss*, 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984).

(2) Reinforcement of Tentative I.D.

Reinforcement can, however, be a factor if the identification was suggestive or tentative. In *State v. Strickland*, 113 Ariz. 445, 556 P.2d 320 (1976), although the victim failed to identify the defendant in two photo lineups and identified someone else at a live lineup, she positively identified him at a preliminary hearing. After the hearing, an officer told her the defendant had confessed.

> Once the witness made her 'positive' identification at the preliminary hearing and was reinforced in that identification by the officer's statement to her that the appellant had confessed, it is obvious that she would stick to that identification at the trial. We hold that the in-court identification was impermissibly tainted by the prior identification of appellant.

113 Ariz. at 448, 556 P.2d at 323 (internal citation omitted). Contrast this with *State v. Henderson,* 116 Ariz. 310, 569 P.2d 252 (App. Div. 1 1977), where after a suggestive lineup, the victim was told that she had identified the man whom the officer "regarded as the likely suspect." The identifications were nevertheless reliable based in part the amount of time the victim had to observe the suspect and on the victim's quick and certain identification.

4). Credibility Test

Arizona courts have apparently even gone one step further than the independent basis and reliability test in order to uphold an in-court identification when a witness:

> − had been unable at pretrial identifications to identify the defendant; − there were unduly suggestive procedures used;
>
> − there was presumably no independent basis for the identification; − the identification did not satisfy the reliability criteria in *Biggers*.

*State v. Nieto,* 11 8 Ariz. 603, 606, 578 P.2d 1032, 1035 (Ariz. App. 1978). In these cases, the court found that the circumstances surrounding the identification went to the credibility of the identification, not its admissibility.

In *Nieto,* the victim, a convenience store clerk, observed the suspect for only five to ten seconds, described the suspect as 5'11" (the defendant was 5'4"), and failed to identify the defendant at a lineup. At the preliminary hearing, the victim said the defendant looked like the robber, but he could not be sure. The court upheld the in-court identification even though there were ".... significant suggestive influences in the identification procedure (at the preliminary hearing) ...." The court held the victim's poorly matched description of the robber may have resulted from the clerk being bent over stocking shelves when he was hit from behind. Based on this, the court held that

> "[w]hen possible, a previous inability to identify the defendant should go to the credibility and not to the admissibility of a witness' subsequent in-court identification."

118 Ariz. at 606, 578 P.2d at 1035.

The victim was shot during a robbery. He was unable to make an identification at a photo lineup because he was in intensive care without his glasses, or at a subsequent physical lineup because of the

defendant's facial hair. Later, at a *Dessureault* hearing, the victim positively identified the defendant because he was then neatly groomed and cleanly shaven. The court affirmed under the "absence of clear and manifest error" test, holding that the witnesses previous inability to identify the defendant should go to the credibility, not the admissibility, of subsequent in-court identifications, especially where the defendant has a full and complete opportunity to cross-examine the witness. *State v. Myers*, 117 Ariz. 79, 570 P.2d 1251 (1977), quoting *People v. Belenor*, 71 Mich. App.. 10, 246 N.W.2d 355, 357 (1976).

The rape victim identified the defendant at a lineup wherein defendant was 36 years old and all other participants were 20-24. The defendant was also the tallest and heaviest. The victim had described her attacker as 3 2-34 years old. The victim's identification was primarily voice, as there was much conversation during the rape. At the conclusion, the victim was informed that she had identified the man "regarded as the likely suspect." The identification was ruled reliable, even though the victim didn't notice the defendant's "bad eye." The court stated that the "failure to notice a specific feature goes to the weight of the identification and not to its admissibility." *State v. Henderson*, 116 Ariz. 310, 315, 569 P.2d 252, 257 (App. 1977).

## IV. SOME IDENTIFICATION ISSUES AT TRIAL

### A. In-Court Identification Of The Defendant

Besides issues of suggestivity, reliability, etc., other questions relating to the identification of the defendant arise at trial. *See State v. Perkins*, 141 Ariz. 278, 288-263, 686 P.2d 1248, 1258-1263 (1984) (good general discussion), overruled on other grounds *State v. Henry*, 189 Ariz. 542, 944 P.2d 57 (1997).

#### 1. Defendant Present

##### a. How to Make the Record

Parenthetically, beginning prosecutors should remember that after a witness has identified the defendant, a "record must be made" on that identification. For example:

> Q: Is that person in the courtroom?
> A: Yes.
> Q: Would you point him out for the court and jury?
> A: (witness indicates)
> Q: What is he wearing?
> A: A blue shirt.
> Your honor, may the record reflect that the witness has identified the defendant.

##### b. Special Identification Issues

A trial court may order a defendant to:

- Show certain parts of his body, State v. Day, 148 Ariz. 490, 495,715 P.2d 743, 748 (1986) abrogated on other grounds in State v. Ives, 187 Ariz. 102, 927 P.2d 762 (1996) (frontal nude photograph of the "potbellied rapist" with small penis);

- Speak certain words, *State v. Spain,* 27 Ariz. App. 752 , 755, 558 P.2d 947, 950 (App. Div. 2 1976) (words spoken at the time of the offense);

- Approach the witness at trial, *State v. Rocha,* 109 Ariz. 167, 168, 506 P.2d 1061,1062 (1973) (witness nearly blind), or;

- Admit pictures of prejudicial tattoos on defendant's hands, *State v. Sanchez,* 130 Ariz. 295, 300, 635 P.2d 1217, 1222 (App. Div. 2 1981).

Such an order does not violate the defendant's Fifth Amendment rights because the actions are non-testimonial.

2. Defendant Absent at Trial

The state may use booking photographs and fingerprints to prove identification. At least one prosecutor then taped the defendant's picture to the defendant's empty chair during argument. *State v. Thibeault,* 131 Ariz. 192, 194, 639 P.2d 382, 384 (1981); *State v. Davis,* 115 Ariz. 3, 562 P.2d 1370 (App. Div. 2 1977).

3. Compelling Defendant to be Present for Identification at Trial.

The court can compel the defendant to be present at a Dessureault hearing even though he has waived his right to be present because he claims he does not want the witnesses identification to be reinforced by his presence in the courtroom. *State v. Mumford,* 136 Ariz. 465, 466-67, 666 P.2d 1074, 1075-76 (App. Div. 2 1982).

B. Admissibility Of Evidence Of Extra-Judicial Identifications

"Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity," even if the witness fails to repeat the extra-judicial identification in court, because the extra-judicial identification tends to connect the defendant with the crime. Moreover, the principal danger of admitting hearsay evidence is not present because the witness is available for cross-examination. *State v. Finn,* 111 Ariz. 271, 277-78, 528 P.2d 615, 621-22 (1974) citing *People v. Gould,* 54 Cal. 2d 621, 622, 7 Cal.Rptr. 273, 275, 354 P.3d 865, 867 (1960). See also *State v. Taylor,* 99 Ariz. 151, 407 P.2d 106 (1965); *State v. McDaniel,* 119 Ariz. 373, 580 P.2d 1227 (App. Div. 2 1978).

A FBI agent testified that a head injury victim picked defendant's photo from a lineup while in the

hospital. At trial, the head injury victim could not even remember seeing the attacker's face, although he remembered making the identification. The defense claimed the victim identified the wrong person in a suggestive lineup. The United State Supreme Court upheld admission of the evidence under Rules 801(d)(1)(C) and held the evidence was admissible without additional indicia of reliability. The witness was subject to cross-examination, which satisfied the Confrontation Clause. *United States v. Owens*, 484 U.S. 554, 559, 108 S.Ct. 838, 842-43 (1988).

1. As Corroboration and Substantive Evidence

The Rules of Evidence provide that a statement of identification made after perceiving a person is not hearsay. Rule 801(d)(1)(C), Ariz. R. Evid. The evidence is admissible for corroboration and substantive evidence.

The victim was beaten by the defendant and then identified him two weeks later in a lineup. At trial, officers testified about the identification by reciting the hearsay statements of the victim. Although the Supreme Court based its holding upon the defendant's failure to object, the court agreed with the State's contention that the hearsay testimony of a witness' pre-trial identification is "fully admissible" because a pre-trial identification is of greater significance than one made in the courtroom. *State v. Taylor,* 99 Ariz. 151, 153, 407 P.2d 106, 107 (1965).

The victim's prior identification of the defendant was corroborated by a desk clerk. The court held that the desk clerk's testimony was admissible for its substantive value as well. *State v. Finn,* 111 Ariz. 271, 278, 528 P.2d 615, 622 (1974).

2. As the Only Substantive Evidence of the Identification

An officer testified to victim's statement upon seeing the defendant's wife, (that she was the one who had "set him up" for the roll job). Court reaffirmed *Taylor, supra,* that prior identification " . . . is of greater significance than one made in the courtroom and that testimony of one who has observed such incident is fully admissible." *State v. Kevil,* 111 Ariz. 240, 245, 527 P.2d 285, 290 (1974).

Victim, a five-year old girl, tentatively, then positively, identified the man who molested her from a ten man photo spread. Later, she was unable to make any identification. Witnesses to the identification were permitted to testify to the identification. *State v. Williams,* 121 Ariz. 213, 215, 589 P.2d 456, 458 (1979).

Victim, a seven-year old girl identified her molester as, "the man that was painting the house." Later, at trial, the girl could not make an identification but several witnesses testified to the identification. The court in discussing the admissibility of the testimony, cited *Kevil, Taylor* and *Gilbert v. California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). *State v. McDaniel,* 119 Ariz. 373, 375, 580 P.2d 1227, 1229 (App. Div. 2

1978).

Victim picked the defendant out of a photo lineup, but at trial, he couldn't remember who he picked nor could he identify the defendant. The officer who showed the photo spread was allowed to testify to the prior identification. *State v. Jackson*, 24 Ariz.App. 7, 9, 535 P.2d 35, 37 (App. Div. 1 1975). Accord *State v. Ault*, 150 Ariz.. 459, 724 P.2d 545 (1986) (six year old unable to identify defendant at trial).

C. Timeliness Of Objection To Admissibility Of Identification

Counsel may choose to waive the identification issue as a matter of trial strategy. *See generally State v. Garcia*, 133 Ariz. 522, 525, 652 P.2d 1045,1048 (1980). Cf. *State v. Roberts*, 144 Ariz. 572, 575, 698 P.2d 1291, 1294 (App. Div. 1 1985); *State v. Parris*, 144 Ariz. 219, 223, 696 P.2d 1368, 1372 (App. Div. 1 1985); *State v. Meeker*, 143 Ariz. 256, 264-64, 693 P.2d 911, 919-20 (1984). However, failure to raise the identification issue has resulted in counsel being found ineffective. *State v. Edwards*, 139 Ariz. 217, 221, 677 P.2d 1325, 1329 (App. Div. 1 1984).

Occasionally, a defense attorney will wait until some evidence of the identification has been taken at trial before objecting to the identification. By so doing, the attorney has waived his client's right to object to the identification.

> A defendant should not be permitted to wait until trial to establish improper conduct when counsel knew of it prior to trial. To allow such a procedure would be to give the defendant the opportunity to create a mistrial simply by timing his objection until after the jury had heard evidence concerning the in-court identification.

*State v. Arnold*, 26 Ariz.App. 542, 545, 549 P.2d 1060, 1063 (App. Div. 1 1976). If the defendant waits until trial to object to or move for suppression of an identification, the objection or motion should be opposed under A.R.S. Rules of Criminal Procedure, Rule 16.1 and the cases under it.

D. Impeachment - Foundation

An identification witness is usually impeached by virtue of the discrepancy between the description the witness originally gave the officer and the actual description of the defendant. In order to question the officer regarding the description given by the witness, the witness must first have been questioned about the description given. *State v. Taylor*, 109 Ariz. 267, 273, 508 P.2d 731, 737 (1973).

In the first trial, the trial court denied the defendant's motion to suppress the identification. On appeal (*McLoughlin I*), the court remanded the case for retrial. On remand, the trial court reconsidered its earlier ruling with the supplementary transcript of an expert witness interview. On appeal (*McLoughlin II*), the appellate court found the expert testimony was not grounds to reconsider its previous decision upholding the admission of the

identification. *State v. McLoughlin,* 139 Ariz. 481, 485, 679 P.2d 504, 508 (1984).

Special jury instructions on the dangers of eyewitness identifications were properly rejected in *State v. Mumford,* 136 Ariz. 465, 468, 666 P.2d 1074, 1077 (App. Div. 2 1982) citing *State v. Valencia,* 118 Ariz. 136, 575 P.2d 335 (App. Div. 2 1977).

If the witness admits the discrepancy the officer may not be questioned as the witness has already been impeached. In *Taylor, supra,* an officer who took the description was called to testify prior to the identifying witness. Defense counsel was precluded from questioning the officer about the description given by the witness.

E. E x pert Testimony

Under certain circumstances, experts may give general testimony about problems affecting the validity of eyewitness identifications. *State v. Chapple,* 135 Ariz. 281, 660 P.2d 1208 (1983). "Expert opinion on eyewitness identification will not frequently meet the standard for proper subject." *State v. Roscoe,* 184 Ariz. 484, 495, 910 P.2d 635, 646 (citing *Chapple,* 135 Ariz. at 291, 660 P.2d at 1218*), cert. denied,* 519 U.S. 854 (1996). The experts cannot quantify "the probabilities of the credibility of another witness." *State v. Lindsey,* 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). Expert testimony on the reliability of a particular identification is improper and should be barred, but general testimony "as to the variables affecting eyewitness identification" is admissible within the discretion of the court. State v. Via, 146 Ariz. 108, 123, 704 P.2d 238, 253 (1985).

In *State v. Poland,* 144 Ariz. 388, 698 P.2d 183 (1985), the court upheld the trial court's ruling denying the admissibility of the expert's testimony, finding that it is within the trial court's discretion whether to admit such testimony. See also State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717 (2001).

If the court is considering the admission of such testimony, it should consider the facts of the case and consider the criteria of: (1) a qualified expert; (2) a proper subject; (3) conformity to a generally accepted explanatory theory; and, (4) probative value compared to the prejudicial effect. *State v. McCutcheon,* 162 Ariz. 54, 57, 781 P.2d 31, 34 (1989).

It is well and good for the court to say that experts may not testify about the probability that a particular witness is mistaken. From the juror's viewpoint, the legal hair splitting is probably a distinction without a difference. Here is an expert with impressive sounding credentials saying that eyewitnesses are not trustworthy for various reasons. The evidence includes an eyewitness identification. Even if the jury is given a limiting instruction, how many jurors will understand that the expert was testifying about general factors and is no more able than they are to say when a particular witness is mistaken? The most likely result is the juror will discount the eyewitness testimony. Recently, A.P.A.A.C. learned of an acquittal in a rape case because the court

decided to let an expert, disclosed two days before trial, testify.

After learning of the rape case, A.P.A.A.C. acquired some materials which are available to offices upon request. Prosecutors looking for a expert who is able to debunk the eyewitness expert should contact Dr. Michael McClosky at the John Hopkins University Department of Psychology. A.P.A.A.C. also has a four page article from the CDAA which was republished in the Maryland Prosecutor which outlines row to handle such evidence. Finally, A.P.A.A.C. has a 78 page 150 footnote paper prepared by Steve Pass for Professor Inwinkelreid, which details the basic flaws in the eyewitness experts to make jurors further doubt eyewitnesses.

F. "Opening The Door"

If an identification is either suppressed or the prosecutor does not question the witness about it on direct and the defense attorney decides to cross-examine the witness regarding the identification, the defendant has "opened the door to the entire subject of identification." *State v. Mead*, 120 Ariz. 108, 109, 584 P.2d 572, 573 (App. Div. 2 1978). *See generally State v. Garcia*, 133 Ariz. 522, 652 P.2d 1045 (1980) (cross-examination opened door for identification on redirect); *State v. Conn,* 137 Ariz. 152, 156, 669 P.2d 585, 589 (App. Div. 2 1982) (voice identification); aff'd, 137 Ariz. 148, 669 P.2d 581 (Ariz. 1983).

In *State v. Meronek,* 110 Ariz. 444, 520 P.2d 492 (1974), the pretrial show-up identification was suppressed. At trial, the defendant took the stand and testified that the victim failed to identify him. Citing *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643 (1971), the court approved the impeachment and rebuttal of the defendant's testimony.

G. Jury Instructions

The court did not commit reversible error when it gave the jury instructions in the language of *Dessurealt*. It would be a better idea to use simpler language. *State v. Cannon,* 148 Ariz. 72, 80, 713 P.2d 273, 281 (1985).

1. Identification Not Suggestive

If the identification was ruled not unduly suggestive, and instruction to the jury regarding the identification is unwarranted. *State v. Perry,* 116 Ariz. 40, 567 P.2d 786 (App. Div. 2 1977); *State v. Harris,* 23 Ariz.App. 358, 533 P.2d 569 (App. Div. 2 1975).

2. Suggestive But Admissible

If the identification is unduly suggestive but ruled admissible, the trial court must, if requested by defense counsel, instruct the jury on suggestivity and independent source. Refusal to do so is reversible error. *State v. Stow,* 109 Ariz. 282, 508 P.2d 1144 (1973) (The vitality of this third "step" of *Dessureault, supra,* is debatable in light of the courts' increasing reliance upon the *Biggers*' factors.).

3. Miscellaneous Identifications

If the identification is "in court" or the witness can make only a tentative identification or the witness is identifying the defendant for purposes other than as perpetrator of the crime, a *Dessureault* instruction may be unnecessary. *See State v. Noles,* 113 Ariz. 78, 83, 546 P.2d 814, 819 (1976).

4. Burden on Appeal

Refusal to give a *Dessureault* instruction will not be error or will be deemed harmless if it can be determined by clear and convincing evidence that the in-court procedure was not tainted by prior identifications. *State v. Moran,* 109 Ariz. 30, 31, 504 P.2d 931, 932 (1972).

5. Eyewitness Dangers Instruction

The trial court correctly rejected a defense instruction on the dangers of eyewitness identifications. *State v. Mumford,* 136 Ariz. 465, 467,666 P.2d 1074,1076 (App. Div. 2 1982).

V. ISSUES ON APPEAL

A. Abuse Of Discretion - Clear And Manifest Error Test

Whether there has been an accurate in-court identification of the defendant, not tainted by prior unfair identification procedures, is a preliminary question for the trial court and a trial court's determination will not be overturned on appeal absent a clear and manifest error.

*State v. Smith,* 146 Ariz. 491, 707 P.2d 289 (1985); *State v. Via,* 146 Ariz. 108, 704 P.2d 238 (1985); *State v. Bracy,* 145 Ariz. 520, 703 P.2d 482 (1985); *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985); *State v. Poland,* 144 Ariz. 388, 698 P.2d 183 (1985); *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (1980); *State v. McGill,* 119 Ariz. 582, 578 P.2d 1183 (1978); *State v. Bailes,* 118 Ariz. 582, 578 P.2d 1011 (App. Div. 2 1978); *State v. Torres,* 116 Ariz. 377, 569 P.2d 807 (1977); *State v. Lamb,* 116 Ariz. 134, 568 P.2d 1032 (1977); *State v. Sanchez,* 116 Ariz. 118, 568 P.2d 425 (App. Div. 2 1977); *State v. Williams,* 113 Ariz. 442, 556 P.2d 317 (1976); *State v. Ware,* 113 Ariz. 337, 554 P.2d 1267 (1976); *State v. Ware,* 113 Ariz. 337, 554 P.2d 1264 (1976); *State v. Jackson,* 112 Ariz. 149, 539 P.2d 906 (1975); *State v. Milonich,* 111 Ariz. 442, 532 P.2d 504 (1975); *State v. Williams,* 111 Ariz. 175, 526 P.2d 714 (1974); *State v. Flynn,* 109 Ariz. 545, 514 P.2d 466 (1973); *State v. Taylor,* 109 Ariz. 518, 514 P.2d 439 (1973); *State v. Winters,* 27 Ariz.App. 508, 556 P.2d 809 (App. Div. 1 1976); *State v. Downing,* 109 Ariz. 456, 511 P.2d 638 (1973); *State v. Verduzco,* 108 Ariz. 74, 492 P.2d 1181(1972); *State v. Nunez,* 108 Ariz. 71, 492 P.2d 1178 (1972); *State v. Jensen,* 106 Ariz. 421, 477 P.2d 252 (1970); *State v. Murray,* 106 Ariz. 150, 472 P.2d 19 (1970); *State v. Darby,* 105 Ariz. 115, 460 P.2d 9 (1969).

B.Waiver - Duty To Object

If the in-court identifications are not challenged at trial, the court will presume that prior identification procedures did not taint the in-court identification. *State v. Dessureault,* 104 Ariz. 380, 584, 453 P.2d 951 (1969). Other cases standing for this proposition include:

*State v. Burton*, 144 Ariz. 248, 697 P.2d 331 (1985); *State v. Harding,* 137 Ariz. 278, 670 P.2d 383 (1983), cert. denied 104 S.Ct. 1017; *State v. Hanson*, 138 Ariz. 296, 674 P.2d 850 (App. Div. 2 1983); *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 654 (1980;) *State v. Arnold*, 26 Ariz.App. 542, 549 P.2d 1060 (App. Div. 1 1976); *State v. Carriger*, 112 Ariz. 302, 541 P.2d 554 (1975); *State v. Hardy*, 112 Ariz. 205, 540 P.2d 677 (1975); *State v. Lee*, 110 Ariz. 357, 519 P.2d 56 (1974); *State v. Moran*, 109 Ariz. 30, 504 P.2d 931 (1972); *State v. Brady*, 16 Ariz.App. 393, 493 P.2d 939 (App. Div. 1 1972).

C Harmless Error

Many cases have applied the harmless error doctrine to identification procedures. *Dessureault* expressly stated that if the procedures did not contribute to the verdict, the error was harmless.

*State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (1985); *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985); *State v. Alvarez*, 145 Ariz. 370, 701 P.2d 1178 (1985); *State v. Hauss*, 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983); *State v. Nelson*, 129 Ariz. 582, 633 P.2d 391 (1981); *State v. Reid*, 114 Ariz. 16, 559 P.2d 136 (1976); *State v. Rodriguez*, 113 Ariz. 409, 555 P.2d 655 (1976); *State v. Arnold*, 26 Ariz.App. 542, 549 P.2d 1060 (App. Div. 1 1976); *State v. Scott*, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975); *State v. Nunez*, 108 Ariz. 71, 492 P.2d 1178 (1972); *State v. Lang*, 107 Ariz. 400, 489 P.2d 37 (1971).

## VI. MISCELLANEOUS

### A. The Dessureault Hearing

Identification issues have been controlled by *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), for so long that identification suppression hearings are generally characterized as "*Dessureault* hearings." Although this characterization is somewhat of a misnomer since the encroachment of the reliability test, *Dessureault* still retains much of its procedural vitality. Besides the dictates of *Dessureault*, certain factors should be remembered:

#### 1. Issues

The only questions to be answered at the *Dessureault* hearing are:

(a) Was the identification procedure unduly suggestive? (If it was not, the inquiry is complete.)

(b) If it was unduly suggestive:

(1) will (did) it impermissibly taint later identifications (is there an independent basis for later identifications?)

or

(2) notwithstanding undue suggestivity was the identification reliable?

In *State v. Smith*, 123 Ariz. 243, 248, 599 P.2d 199, 204 (1979), the defendant was identified at a photo lineup after the victim had seen the defendant's picture in the paper. At the *Dessureault* hearing, the defendant attempted to introduce evidence that the victim had made an initial mistake in the identification of a co-perpetrator and that the victim was unable to articulate a description of the defendant after the crime for the detective artist. The trial court excluded the proffered testimony of the sketch artist. The appellate court held that, "because the accuracy of the witness' prior description of the criminal is one of the factors to be considered in evaluating the potentiality of misidentification, the artists' testimony should have been admitted at the *Dessureault* hearing."

2. Burden of Proof

*Dessureault* established a burden upon the State to prove by "clear and convincing evidence" that the pretrial identification was not unduly suggestive or that the in-court identification will not be tainted. 104 Ariz. at 384. The Arizona Rules of Criminal Procedure, Rule 16.2(b) suggests that the burden of proof on a motion to suppress identification is preponderance of the evidence, and that the burden doesn't arise until after the defendant establishes "that the circumstances were so suggestive as to give rise to a substantial likelihood of irreparable misidentification." *State v. Mead,* 120 Ariz. 108, 111, 584 P.2d 572 at 575 (App. Div. 2 1978) (Illinois citation omitted).

However, Arizona courts continue to hold that the burden of proof in a *Dessurealt* hearing remains "clear and convincing evidence." *State v. Osorio,* 187 Ariz. 579, 931 P.2d 1089 (App. Div. 1 1996); *State v. Strong,* 185 Ariz. 248, 914 P.2d 1340 (App. Div. 1 1995); *State v.* Smith, 146 Ariz. 491, 496, 707 P.2d 289, 294 (1985).

3. Victim Not Present

The identification witness need not be present at a *Dessureault* hearing if the identification is shown to be not unduly suggestive. *State v. Downing,* 109 Ariz. 456, 459, 511 P.2d 638, 641 (1973). *See generally State v. Smith,* 146 Ariz. 491, 707 P.2d 289 (1985).

However, if the procedure is ruled unduly suggestive, the prosecutor will find it difficult to prove independent basis or reliability without the identification witness' testimony.

A way to avoid having to put the identification witness on the stand, unless necessary, is to get the court to bifurcate the hearing with the first part dealing only with suggestivity. *See also State v. Chapple,* 135 Ariz.

281, 660 P.2d 1208 (1983).

4. Specific Findings of Fact

It is not necessary to make specific findings under *Dessureault* if the trial judge conducts a proper *Dessureault* hearing. *State v. Winters,* 27 Ariz.App. 508, 512, 556 P.2d 809, 813 (App. Div. 1 1976). The judge should rule on the motion prior to the witness testifying. *State v. Castaneda,* 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986).

5. Presence in Court for Identification

The defendant can be compelled to remain in the courtroom during the hearing, even though he protests his presence will reinforce the later in-court identification, *State v. Mumford,* 136 Ariz. 465, 467, 666 P.2d 1074, 1076 (App. Div. 2 1982). *See also State v. Howland* ,134 Ariz. 541, 658 P.2d 194 (App. Div. 2 1982) (no appellate comment on judge's requirement of stipulation from defendant that witnesses would identify him, before the judge let defendant leave the trial, which was in progress).

B. Identifications And The Fifth Amendment Compulsion Question

The Fifth Amendment is not violated by the taking of "non-testimonial" evidence. *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826 (1966). In *Schmerber,* the court stated that the Fifth Amendment "offers no protection against compulsion to submit to ... write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. 384 U.S. at 763, 86 S.Ct. at 1832. *See also State v. Trujillo,* 120 Ariz. 527, 530, 587 P.2d 246, 249 (1978) (handwriting specimen).

C. Seizure For Purposes Of Identification

1. A.R.S. § 13-3905

If a "detained" suspect is to be placed in a lineup or other identifying characteristic taken from him, a petition and order to detain must be procured pursuant to A.R.S. § 13-3905. Defendant has no right to counsel at the A.R.S. § 13-3905 lineup. *State v. Via,* 146 Ariz. 108, 704 P.2d 238 (1985).

2. Rule 15.2(a), Ariz. R. Crim. P.

After an indictment or information against the defendant, prosecutors may compel a defendant to appear for identification proceedings under Rule 15.2 (a). However, the prosecutor's demand is insufficient to allow commenting on failure to comply. The prosecutor must make a good faith effort before he can argue the failure to comply.

D. Loss Of The Photographic Spread

The loss of the photographic lineup may cause the suppression of the pretrial identification but will not

affect the admissibility of the in-court identification if the witness has an "independent basis" for the identification. *State v. Sustaita*, 119 Ariz. 583, 591, 583 P.2d 239, 274 (1978) (under the reliability test, the pretrial identification should be admissible also). *See also State v. Mitchell*, 140 Ariz. 551, 554, 683 P.2d 750, 753 (App. Div. 2 1984) (existence of photos held to be immaterial).

A mistaken belief that the lineup pictures had been destroyed, so that the State didn't produce them at the *Dessureault* hearing, was not grounds for a mistrial or grounds for an acquittal under Rule 15.7 when the pictures were discovered during trial. Defendants had time to do something about the discovery, and did nothing. *State v. Longoria*, 123 Ariz. 7, 11, 596 P.2d 1179,1183 (1979).

E. Identifications For Purposes Of Proving A Prior

There are many ways to prove a prior. The following are probably the easiest:

1. Prison Records

Obtain a certified copy of the prior from the prison. If the defendant spent his time in the Arizona State Prison, you will receive a copy of the prior, as well as fingerprints and photo. This document is self-authenticating under Rules of Civil Procedure Rule 44 and Rules of Evidence 902(2) and 902(4), and are admissible without foundation. *State v. LeMaster*, 137 Ariz. 159, 669 P.2d 592 (App. Div. 1 1983).

Make a motion under Rule 15.2 (a) prior to trial to have the defendant fingerprinted at trial (during a recess, of course), for purposes of impeachment if he should take the stand, and proof of the prior if he should be convicted. This rule is not discretionary; the defendant must acquiesce.

Have your fingerprint expert take the defendant's prints and compare them just before testifying so that he only has to make one trip. (Make sure the fingerprint expert has been disclosed.)

Note: If the defendant spent time in an out-of-state prison, make sure the certified prior is cross-authenticated. Rules of Civil Procedure, Rule 44 (g).

2. Probation Records

When the defendant was given probation instead of prison time for his prior felony, you should subpoena someone who was present at the sentencing, even if you have to bring in the defendant's attorney.

3. Presence for Identification

A defendant can be compelled to be present at trial of the priors allegations, *State v. Morse*, 127 Ariz. 25, 32, 617 P.2d 1141, 1148 (1980).

F. Defendant's Non-existent Right To A Lineup

1. Pretrial

A defendant does not have a constitutional right to a physical lineup, even if he is in custody. In *State v. Rossi,* 146 Ariz. 359, 363, 706 P.2d 371, 375 (1985), the court correctly rejected a request seven months later for a live lineup.

2. Trial

A defendant has no right to be surrounded by people of identical appearance for purposes of identification at trial. *State v. Meeker,* 143 Ariz. 256, 265, 693 P.2d 911, 920 (1984).

G. Defendant in Two Lineups

The courts disapproves of the practice of having the defendant being the only person in two photo lineups or in a photo lineup followed by a live lineup. *State v. Via,* 146 Ariz. 108, 119-120, 704 P.2d 238, 250 (1985). The court has suggested no photo lineup if a live lineup is to follow, or that defendant not be the only person in both. *State v. Alvarez,* 145 Ariz. 370, 372, 701 P.2d 1178, 1180 (1985). However, the court will not suppress the identification if the totality of the circumstances shows the identification is reliable. Id.

H. Physical Object Lineups

A defendant has no right to a *Dessureault* hearing in regards to the identification of physical objects. *State v. Tyler,* 149 Ariz. 312, 314-15, 718 P.2d 214, 216-17 (App. Div. 1 1986) A lineup of physical objects is a very good idea if you are using a tracking dog to determine if defendant's scent is on an item. *State v. Roscoe,* 145 Ariz. 212, 700 P.2d 1312 (1984).

I. Voice Identification

Officers were allowed to give their opinions that the voice on a tape was defendant's voice. *State v. Gortarez,* 141 Ariz. 254, 265, 686 P.2d 1224, 1235 (1984) (applying *Frye* standard).